Supreme Court, U. S.
FILED
AUG 15 1978
MICHAEL RODAK, JR., CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-105

GARY STEPHEN GORDON,
Petitioner,

VERSUS

MAXINE DEE GORDON (now FRANK),
Respondent.

BRIEF OF RESPONDENT OPPOSING PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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August, 1978

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BRIEF OF RESPONDENT OPPOSING PETITION FOR CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

The respondent, Maxine Dee Gordon, now Frank, respectfully prays that this Court deny the writ of certiorari to the Supreme Court of Oklahoma prayed for by petitioner.

ADDITIONAL QUESTIONS PRESENTED

In addition to the question presented by petitioner, the Record raises the following questions for consideration by this Court:

1. Whether a state court's ruling that the evidence showed the mother to be a superior custodian of a minor child rests on an adequate and independent state ground when the state court also passed on a federal constitutional question which was not necessary to the decision.

2. Whether a father who failed at trial to demonstrate that the best interests of his minor child would be served by paternal custody lacks standing to challenge the application of a custody statute which provides a maternal preference "tie-breaker" for use when things are equal, because the application of an absolutely gender-neutral custody criterion would not benefit him.

3. Whether the question of which party bears the burden of proof respecting the validity of a statute alleged to deny equal protection on the basis of gender, which question could have been timely raised but was not presented to the state court until rehearing, is properly before this Court.

4. Whether the Supreme Court of Oklahoma's ruling that a post-hearing tie-breaker maternal preference provision does not deny equal protection to a father unable to prove the child's interests are best served by paternal custody is ripe for review where the record is devoid of evidence essential to a sound constitutional decision.

5. Whether the Supreme Court of Oklahoma's ruling that a post-hearing tie-breaker maternal preference provision does not deny equal protection to a father unable to prove the child's interests are best served by paternal custody is a correct application of this Court's decisions concerning gender-based discrimination.

SUPPLEMENTAL STATEMENT OF THE CASE

Respondent offers the following material to supplement the statement of the case set out by petitioner at pages 4-6 of his Petition and Brief. References to the Petition for Writ of Certiorari will hereafter be abbreviated, *e.g.*, P. at 4-6.

Petitioner's summary of the case makes reference to respondent's (plaintiff-appellant in the court below) "principal contention of error" regarding the post-hearing maternal preference provision of 30 Okl.Stat. 1971 §11 (P. at 5). Petitioner omits any mention of appellant's separate and independent assignment of error, which additional assignment of error contended that the trial judge had abused his discretion in awarding custody of the child to the father because such award was manifestly against the weight of the evidence. This omission is material and substantial because the Supreme Court of Oklahoma sustained respondent's appeal on both grounds asserted. This is relevant to denial of petitioner's application for certiorari because the separate evidentiary question constitutes adequate and independent state grounds and also demonstrates that petitioner herein lacks standing to challenge the Oklahoma statute.

Petitioner suggests (P. at 6) that the federal question was raised by means of plaintiff's (respondent herein) Petition-in-Error. This is incorrect. The federal question was raised for the first time in the brief of appellee (petitioner herein), not in the Petition-in-Error. Furthermore, Appendix C to the Petition contains the Petition-in-Error

filed by petitioner (defendant-appellee in the courts below), not the Petition-in-Error filed by the respondent. Neither Petition-in-Error raises the federal question suggested by petitioner.

Finally, petitioner omits any reference to the fact that the "question presented for review" (P. at 2) was not presented to the Supreme Court of Oklahoma in the form set forth by petitioner. Petitioner's question presented apparently attempts to restate the same question three times, but the third version set forth at page 2 of the Petition contains a reference to the issue of burden of proof in gender-based discrimination cases, which issue was raised by petitioner only upon rehearing before the Supreme Court of Oklahoma. Hence, this issue is not properly before this Court.

REASONS FOR DENYING WRIT OF CERTIORARI

I.

THE DECISION OF THE SUPREME COURT OF OKLAHOMA RESTS ON AN ADEQUATE AND INDEPENDENT STATE GROUND.

It is well-settled that this Court lacks jurisdiction to review state judgments where there exists an independent and adequate state ground for the decision. This Court recently restated this principle in *Zacchini* v. *Scripps-Howard Broadcasting Co.*, ... U.S. ....., 97 S.Ct. 2849, 2852-53, 53 L.Ed.2d 965, 970-971 (1977):

> "If the judgment below rested on an independent and adequate state ground, the writ of certiorari should be dismissed as improvidently granted, *Wilson* v. *Loew's, Inc.*, 355 U.S. 597, 78 S.Ct. 526, 2 L.Ed. 2d 519 (1958), for '[o]ur only power over state judgments is to correct them to the extent that they incorrectly adjudge federal rights. And our power is to correct wrong judgments, not to revise opinions. We are not permitted to render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected its views of federal laws, our review could amount to nothing more than an advisory opinion.' *Herb* v. *Pitcairn*, 324 U.S. 117, 125-126, 65 S.Ct. 459, 463, 89 L.Ed. 789 (1945).
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> * * * * * * *
>
> "Had the Ohio Court rested its decision on both state and federal grounds, either of which would have been dispositive, we would have had no jurisdiction. *Fox Film Corp.* v. *Muller*, 296 U.S. 207, 56 S.Ct. 183, 80 L.Ed. 158 (1935); *Enterprise Irrigation District* v. *Farmer's Mutual Canal Company*, 243 U.S. 157, 164, 37 S.Ct. 318, 320, 61 L.Ed. 644 (1917)."

The decision of the Supreme Court of Oklahoma rested on both state and federal grounds. The court ruled on the federal question of the constitutionality of the child custody statute and upheld the statute against the challenge that it denied the equal protection of the laws to petitioner. However, the Supreme Court of Oklahoma also grounded its decision on the purely state basis that the trial court's findings were against the weight of the evidence. The Supreme Court of Oklahoma held:

> "There is nothing within this statute which prohibits a judge from placing a child, regardless of his or her age, with the father where the evidence supports a finding that the father will be the better custodian and paternal custody will serve the child's best interests.
>
> * * * * * * *
>
> "The evidence in this case did not support the trial court's finding that Danny's welfare and best interests would be best served by placing his custody with his father, the defendant. Plaintiff was shown to be a fit and proper person to have Danny's custody and the award of custody to defendant was clearly against the weight of the evidence." 577 P.2d at 1277 (P. at A-12).

The substantive state ground is adequate and independent because a finding that a paternal custody award is against the weight of the evidence would have mandated a reversal of the trial court's decision even if the Supreme Court of Oklahoma had ruled that 30 Okl.Stat. §11 is unconstitutional. The evidentiary ruling by the Supreme Court of Oklahoma does not in any manner rest upon an unconstitutional standard, nor does it require the petitioner to overcome an allegedly unconstitutional presumption in favor of the mother. Petitioner suggests (P. at 9) that the standard by which the facts are to be reviewed is itself repugnant to the United States Constitution. This argument is without merit because the Supreme Court of Oklahoma's opinion expressly held that the evidence failed to demonstrate that paternal custody would be in the best interests of the child. It is noteworthy that petitioner made no attempt to direct this Court's attention to any language in the opinion of the Oklahoma Supreme Court which purports to demonstrate the application of an unconstitutional standard of evidentiary review. The truth is that petitioner herein was given an opportunity at trial to prove that paternal custody would serve the best interests of the child. He failed. Even the application of a pure "best interests of the child" test would still have required reversal of the trial court's decision.

The Supreme Court of Oklahoma recited the facts from the record which it weighed in determining whether the trial court's custody award constituted an abuse of discretion. The evidentiary review by the state court was full, fair and untainted by the application of an allegedly improper standard. In any case, this Court has stated "we do not grant a certiorari to review evidence and discuss specific facts." *United States* v. *Johnson*, 268 U.S. 220, 227 (1925) (Holmes, J.).

Hence, the substantive state ground that the trial court's award was manifestly against the weight of the evidence and constituted an abuse of discretion is an adequate and independent state basis for the decision of the Supreme Court of Oklahoma. Accordingly, petitioner's application for writ of certiorari should be denied.

II.

THE QUESTION PRESENTED FOR REVIEW BY PETITIONER WAS NOT TIMELY RAISED IN THE SUPREME COURT OF OKLAHOMA.

This Court has long held that a federal question which is not raised until an application for rehearing before a state court is not properly presented to this Court. *Hanson* v. *Denckla,* 357 U.S. 235, 243-44 (1958); *Radio Station WOW, Inc.* v. *Johnson,* 326 U.S. 120, 128 (1945).

The question presented for review by petitioner in this case falls afoul of this rule because, at least as stated by petitioner at page 2 of his Petition, it was not timely presented to the Supreme Court of Oklahoma. Petitioner's third edition of the question presented for review reads as follows:

> "Stated more broadly, is gender-based discrimination based upon purported 'cultural, psychological and emotional' differences between the sexes constitutional and, if so, who has the burden of proving such differences?"

The issue of burden of proof raised in this statement of the question was not presented to the Supreme Court of Oklahoma prior to its opinion released February 7, 1978. A Petition for Rehearing was denied by the Supreme Court of Oklahoma on April 19, 1978, without opinion. The question of burden of proof was raised by petitioner herein only in his brief in support of his application for rehearing by the Supreme Court of Oklahoma. This being the case, petitioner has failed to preserve this question for review by this Court. Respondent recognizes that the general issue of the validity of Oklahoma's child custody statute was timely raised by the petitioner, but respectfully submits that petitioner is not entitled to expand the issues properly before this Court by means of judicious editing.

III.

PETITIONER LACKS STANDING TO CHALLENGE THE OKLAHOMA CUSTODY STATUTE BECAUSE HE WILL NOT BENEFIT EVEN IF THIS COURT WERE TO STRIKE IT DOWN.

This proposition rests on the same factual basis outlined in respondent's discussion of the adequate and independent state ground which is present in this case. The Supreme Court of Oklahoma has ruled as a matter of *fact* that a paternal custody award in this case was an abuse of discretion because against the weight of the evidence. The necessary corollary to this finding is that the evidence at trial demonstrated that maternal custody would best serve the interests of the child. Therefore, a reversal of the Supreme Court of Oklahoma on the constitutional question herein does not benefit the petitioner because at trial he failed to prove an award of custody to him to be in the best interests of the child. Assuming, *arguendo,* that the Oklahoma child custody statute does deny equal protection to some fathers on the basis of their sex, only a father who can demonstrate that custody in him serves the child's best interests is injured because custody otherwise goes to the mother without regard to any allegedly unconstitutional preference. Hence, petitioner does not fall within that class of persons who would be denied the equal pro-

tection of the law, if indeed the Oklahoma statute denies it to anyone. Petitioner is therefore in the position of trying to assert the constitutional rights of another, rather than his own.

It has long been settled that:

> "One to whom application of a statute is constitutional will not be heard to attack the statute on the ground that impliedly it might also be taken as applying to other persons or other situations in which its application might be unconstitutional." *United States* v. *Raines*, 362 U.S. 17, 21 (1960).

The concept of constitutional *jus tertii* is squarely applicable to this case because petitioner herein is attempting to assert the rights of fathers who are denied the custody of their children where they can demonstrate that paternal custody would be in the best interests of the child. This Court has stated that Article III judicial power exists only to redress or otherwise protect against injury to the complaining party, even though the court's judgment may benefit others collaterally, and that a federal court's jurisdiction therefore can be invoked only when the plaintiff himself has suffered some threatened or actual injury resulting from the putatively illegal action. *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975).

In this case, petitioner has alleged no personal stake in the outcome of the controversy as to warrant his invocation of federal court jurisdiction and to justify the exercise of this Court's remedial powers on his behalf. *Warth* v. *Seldin*, 422 U.S. at 498. Accordingly, petitioner herein lacks standing because he lacks a personal stake in

the outcome and is attempting to assert the constitutional rights of others. This he may not do.

This is not a case like *Craig* v. *Boren*, 429 U.S. 190 (1976), where a failure to allow suit by petitioner might have impaired the rights of the proposed third parties. In this case, consideration of third party rights is properly deferred until another day because any person truly disadvantaged by the allegedly unconstitutional Oklahoma child custody statute is able to assert his own rights and will not have those rights impaired if this Court declines to permit petitioner herein to assert *jus tertii* standing.

Respondent recognizes that she is raising the standing question for the first time before this Court. However, unlike the situation in *Craig* v. *Boren*, *supra*, respondent is raising the standing question at the first opportunity which has been available to her. Prior to the opinion of the Supreme Court of Oklahoma, respondent had obtained no adjudication that a paternal custody award in this case would be against the best interests of the child. Having obtained such an adjudication only in the Supreme Court of Oklahoma, respondent is raising the standing question at the first reasonable opportunity. Furthermore, respondent respectfully submits that it is proper for her to raise the standing issue at this juncture because she is entitled to assert any grounds available in support of the decision of the court below.

IV.

THE DECISION OF THE SUPREME COURT OF OKLAHOMA IS NOT INCONSISTENT WITH THIS COURT'S DECISIONS ON GENDER-BASED CLASSIFICATIONS.

Petitioner argues (P. at 13-20) that the opinion of the Oklahoma Supreme Court is not in accord with this Court's decisions relating to sexual classifications. Petitioner urges this position despite the fact that this case is readily distinguishable from previous rulings by this Court on the question of gender-based classifications. This is not a case in which the reason asserted to justify the challenged gender-based classification is solely administrative convenience, as was the case in *Reed* v. *Reed*, 404 U.S. 71 (1971), and *Frontiero* v. *Richardson*, 411 U.S. 677 (1973); *Schlesinger* v. *Ballard*, 419 U.S. 498, 509-10 (1975). Nor is this a case in which the statute is based upon "increasingly outdated misconceptions concerning the role of females in the home rather than in the 'marketplace and world of ideas'" such as were present in *Stanton* v. *Stanton*, 421 U.S. 7 (1975), or *Weinberger* v. *Weisenfeld*, 420 U.S. 636 (1975). *Craig* v. *Boren*, 429 U.S. 190, 198-199 (1976). This is not a case which turns upon a denial of due process or considers a statute which entirely excludes one sex from consideration, as was the case in *Stanley* v. *Illinois*, 405 U.S. 645 (1972). And, finally, petitioner's assertions to the contrary notwithstanding, this is not a case which rests entirely upon "old notions" of role typing.

Petitioner attempts to make much of the fact that the Supreme Court of Oklahoma's opinion employed the term

"old notions" in the course of declaring its judgment. The full text of the Supreme Court of Oklahoma statement makes it clear that the *basis* of the court's opinion was not an "old notion":

> "We are of the opinion that the gender-based means chosen by our Legislature are substantially related to this important objective and the classification scheme is constitutional. It is indeed an old notion that a child of tender years needs a mother more than a father, but defendant has not persuaded us that this notion is either unsound or unconstitutional. We believe that consideration of the cultural, psychological and emotional characteristics that are gender related make this custodial preference one of 'those instances where the sex-centered generalization actually [comports] to fact.' *Craig* v. *Boren*, supra, 429 U.S. at 199, 97 S.Ct. at 458, 50 L.Ed.2d at 408." 577 P.2d at 1277 (P. at A-11).

In context, it is apparent that the Supreme Court of Oklahoma chose the term "old notion" in direct response to the attempt by petitioner in the court below to support his challenge to the child custody statute with nothing more than the incantation of a term expressly disapproved by this Court in the course of its striking down an entirely different type of statute in *Stanton* v. *Stanton*, 421 U.S. 7 (1975). The maternal preference provision in 30 Okl.Stat. §11 is more than an old notion; it is the product of judicial experience, codified by the Legislature and verified by the empirical research. In Bradbrook, "The Relevance of Psychological and Psychiatric Studies to the Future Development of the Laws Governing the Settlement of Inter-parental Child Custody Disputes," 11 J. FAMILY

LAW 557, 586-7 (1971), the application of psychological research to the guidelines employed by the courts in determining child custody matters was examined in great detail. After carefully examining the relevant psychological studies and taking due account of conceptual and statistical methodological limitations of the current research, the author concludes that the psychological literature supports the concept that a young child should normally be awarded to its mother. The author states:

> "The boldest justifiable conclusion that can be made on the strength of the prevailing evidence is that, under normal circumstances, *a child under the age of seven is better off with its mother,* as is a girl of any age. Persuasive, though not quite as significant, evidence further suggests that a boy over the age of seven is better off with his father. On the basis of this statement it is possible to argue that, in the case of a boy, custody should be awarded temporarily to the mother if he is under seven years old, but that once he reaches his seventh birthday custody should be changed to the father, assuming that the latter is still willing to become custodian. However, Bowlby has presented evidence to show the frequent changes of home and caretakers produce undesirable results, such as anxiety, depression, and excessive clinging. *Thus, the better choice would seem to be to allow the mother of a boy to retain custody throughout childhood.*" 11 J. FAMILY LAW at 586-7. (emphasis added).

The case before this Court is further distinguishable from any previous gender-based discrimination case because its text provides that the maternal preference is to be applied only if other things are equal. The effect of this is that a trial court awarding custody pursuant to

30 Okl.Stat. §11 hears the evidence and awards the custody based upon the best interests of the child. Only if the evidence is evenly balanced between the parents does the trial court then apply the maternal preference provision.

This is a case in which the legislative scheme satisfies the Constitution by "adopt[ing] procedures for identifying those instances where the sex-centered generalization actually comport[s] with fact." *Craig* v. *Boren,* 429 U.S. 190, 199 (1976). The Oklahoma maternal preference is utilized only after the father has been given a full opportunity to demonstrate his superior individual qualifications—*and has failed.* To the extent that cases relied upon by respondent in her argument to the Supreme Court of Oklahoma hold differently, the Supreme Court of Oklahoma's opinion makes it clear that they do not survive the ruling in this case. The Supreme Court of Oklahoma stated:

> "There is nothing within this statute which prohibits a judge from placing a child, regardless of his or her age, with the father where the evidence supports a finding that the father will be the better custodian and paternal custody will serve the child's best interests.
>
> "The gender preferences of 30 O.S. 1971, §11, are intended to direct the Trial Court's determination of custody only when the scales are relatively balanced between the attributes of both parents, and the statute should be used only in such a situation." 577 P.2d at 1277 (P. at A-12).

Respondent respectfully submits that any constitutional infirmity in the Oklahoma child custody statute has been cured by the narrowing construction given that stat-

ute by the Oklahoma Supreme Court in this case. Under the statute as construed by the Oklahoma Supreme Court, a father who can demonstrate that paternal custody will serve the child's best interests is entitled to custody of the child notwithstanding the "other things being equal" maternal preference provision. The maternal preference provision operates only where the father is unable to demonstrate that the best interests of the child would be served by paternal custody. Therefore, the Oklahoma statute does not deny any father the equal protection of the laws, much less the father in this case, who was unable to prove that his child's best interests would be served by paternal custody.

V.

THE CONSTITUTIONALITY OF THE OKLAHOMA CUSTODY STATUTE IS NOT RIPE FOR DECISION BECAUSE THIS CASE LACKS A FULL RECORD ADEQUATE TO SHARPLY FRAME THE ISSUES.

Petitioner argues at some length (P. at 14-15) that the Supreme Court of Oklahoma lacked evidentiary support for its conclusion that gender generalizations comport to fact. The record in this case contains no such evidence because the constitutional question was not raised by petitioner at the trial court level, but first arose in the appellee's brief. Furthermore, the need for taking evidence to support the statutory classification was not argued by petitioner until his petition for rehearing, after the Supreme Court of Oklahoma had already rendered its opinion.

If the record now lacks evidence required for a constitutional adjudication, the lack is caused by the failure

of petitioner to raise the issue at a time which would have allowed the presentation of evidence. However, to the extent that the record lacks the evidence which petitioner maintains is essential to upholding the constitutionality of the Oklahoma custody statute, yet another reason exists why this Court should not issue a writ of certiorari. In *Socialist Labor Party* v. *Gilligan*, 406 U.S. 583, 588-589 (1972), this Court stated:

> "This Court has recognized in the past that even when jurisdiction exists it should not be exercised unless the case 'tenders the underlying constitutional issues in clean-cut and concrete form.' *Rescue Army* v. *Municipal Court*, 331 U.S. 549, 584, 91 L.Ed. 1666, 1686, 67 S.Ct. 1409 (1947). Problems of prematurity and abstractness may well present 'insuperable obstacles' to the exercise of the court's jurisdiction, even though that jurisdiction is technically present."

Respondent respectfully submits that the doctrine of ripeness is applicable in this case. While jurisdiction may be technically present, the fact remains that it would be premature for this Court to enter a judgment on the constitutionality of the Oklahoma child custody statute in the absence of a full record adequate to sharply frame the issues. The question of child custody touches upon unquestionably sensitive areas of family concern and requires plenary consideration of all factual and expert opinion evidence which can reasonably be brought to bear upon the question.

If this Court were to decide the constitutionality of Oklahoma's child custody statute on the record before it, there exists a substantial risk that important constitutional

questions will be decided in a virtual factual vacuum. Respondent respectfully submits that a factual record adequate to sharply frame the complex issues which would face this Court is essential to a prudently considered resolution of the constitutional issue. Hence, certiorari should be denied because the constitutional issue presented herein is not ripe for adjudication.

VI.

THE OKLAHOMA AND NEW YORK COURTS ARE NOT IN CONFLICT ON THE CONSTITUTIONAL QUESTION PRESENTED HEREIN.

Petitioner argues (P. at 20-22) that the decision of the Supreme Court of Oklahoma in this case is in direct conflict with the case of *State ex rel. Watts* v. *Watts*, 77 Misc.2d 178, 350 N.Y.S.2d 285 (1973). This is in error.

Initially, petitioner cites no authority in support of his implied contention that a conflict between *state* courts is grounds for granting a petition for writ of certiorari. While respondent is aware that this Court is not limited to those specific considerations in granting certiorari set forth in Supreme Court Rule 19, respondent respectfully submits that it is incumbent upon petitioner to demonstrate why the "conflict" outlined in his brief constitutes a reason for granting certiorari. This is particularly appropriate with regard to the particular case cited by petitioner.

The *Watts* case cited by petitioner is not in fact in direct conflict with the decision of the Supreme Court of Oklahoma. Initially, it is clear from reading the *Watts* case that it is the opinion of the Family Court, City of New

York, New York County. The Family Court for the City of New York is far from being a state court of last resort and is apparently only a trial court. Hence, there is no conflict between the opinions of two state courts of last resort and therefore no reasonable basis for granting a writ of certiorari based upon such conflict.

Secondly, and more importantly, the *Watts* case and this case are not in conflict. In *Watts*, the trial court specifically ruled that the effect of the New York custody statute was to abolish the so-called tender years doctrine and the *Watts* case therefore may be explained purely on the basis of statutory interpretation. In contrast, the tender years doctrine in Oklahoma exists as specifically set forth in the statute, 30 Okl.Stat. §11, and is not declared illegal by any other provision of Oklahoma law. Furthermore, the constitutional dictum in the *Watts* decision is erroneously premised upon the concept that sex is a suspect classification for equal protection analysis purposes, a proposition which has never been declared by a majority of this Court. *See, Craig* v. *Boren*, 429 U.S. 190, 217 (1976) (Rhenquist, J., dissenting).

Accordingly, the alleged conflict between the *Watts* case and the decision in this case by the Supreme Court of Oklahoma does not exist and does not constitute grounds for granting a writ of certiorari.

CONCLUSION

This case does not present the "special and important reasons" required by Supreme Court Rule 19 for review on writ of certiorari. Even if jurisdiction is technically present in this Court, respondent respectfully submits that for all the reasons set forth above this Court should exercise its sound judicial discretion and decline to review this case.

Respectfully submitted,

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August, 1978

CERTIFICATE OF SERVICE

I hereby certify that I served three (3) printed copies of this Brief of Respondent Opposing Petition for Certiorari upon counsel for the petitioner

William B. Rogers
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by depositing the same in a United States Mailbox, with First Class postage pre-paid, this _____ day of August, 1978.

_____

Arnold D. Fagin